

**ORDINANCE NO. 8751**

**AN ORDINANCE OF THE CITY OF LAWRENCE, KANSAS  
CONCERNING OPERATING UNDER THE INFLUENCE,  
ENACTING SECTION 17-104.11 OF THE CODE OF THE CITY  
OF LAWRENCE, KANSAS, 2011 EDITION AND AMENDMENTS  
THERE TO.**

**BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF LAWRENCE, KANSAS:**

**Section 2.** Chapter 17, Article 4, Section 17-104.11 of the Code of the City of Lawrence, Kansas, 2011 Edition and amendments thereto, is hereby enacted to read as follows:

**17-104.11 REFUSING TO SUBMIT TO A TEST TO DETERMINE THE PRESENCE OF ALCOHOL OR DRUGS.**

- (A) Refusing to submit to a test to determine the presence of alcohol or drugs is refusing to submit to or complete a test or tests deemed consented to under subsection (a) of K.S.A. 8-1001, and amendments thereto, if such person has:
  - (1) Any prior test refusal as defined in K.S.A. 8-1013, and amendments thereto, which occurred: (A) On or after July 1, 2001; and (B) when such person was 18 years of age or older; or
  - (2) Any prior conviction for a violation of K.S.A. 8-1567 or 8-2,144, and amendments thereto, or a violation of an ordinance of any city or resolution of any county which prohibits the acts that such section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging any such violations, which occurred:
- (B) On or after July 1, 2001; and when such person was 18 years of age or older, refusing to submit to a test to determine the presence of alcohol or drugs is:
  - (1) On a first conviction a class A, nonperson misdemeanor. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,250 nor more than \$1,750. The person convicted shall serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 120 hours of confinement.

Such 120 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2011 Supp.21-6609, and amendments thereto, to serve the five days' imprisonment mandated by this subsection only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 120 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 120 hours. Prior to any sentencing for a first conviction, the court shall order the person to participate in an alcohol and drug evaluation conducted by a provider in accordance with K.S.A. 8-1008, and amendments thereto. The person shall be required to follow any recommendation made by the provider after such evaluation, unless otherwise ordered by the court.

- (2) On a second conviction a class A, nonperson misdemeanor unless the person has a prior conviction which occurred within the preceding 10 years, not including any period of incarceration then it is a non-person felony and it should be referred to District Court. On a second conviction Misdemeanor, the person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,750 nor more than \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 2,160 hours of confinement. Such 2,160 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2011 Supp. 21-6609, and amendments thereto, to serve the 90 days' imprisonment mandated by this subsection only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 2,160 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the

offender's residence provided for in the house arrest agreement shall not be counted as part of the 2,160 hours. All third and subsequent convictions are non-person felonies and should be referred to District Court.

- (C) Any person convicted of violating this section or an ordinance which prohibits the acts that this section prohibits who had one or more children under the age of 14 years in the vehicle at the time of the offense shall have such person's punishment enhanced by one month of imprisonment. This imprisonment must be served consecutively to any other minimum mandatory penalty imposed for a violation of this section or an ordinance which prohibits the acts that this section prohibits. Any enhanced penalty imposed shall not exceed the maximum sentence allowable by law. During the service of the enhanced penalty, the judge may order the person on house arrest, work release or other conditional release.
- (D) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to \$5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date.
- (E) Prior to filing a complaint alleging a violation of this section, a prosecutor shall request and shall receive from the Division
  - (1) A record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state; and
  - (2) Kansas bureau of investigation central repository all criminal history record information concerning such person.
- (F) The court shall electronically report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings on a complaint alleging a violation of this section to the division. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.
- (G) For the purpose of determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under this section:

- (1) Convictions for a violation of K.S.A. 8-1567, and amendments thereto, or a violation of an ordinance of any city or resolution of any county which prohibits the acts that such section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging any such violations, shall be taken into account, but only convictions or diversions occurring: On or after July 1, 2001; and when such person was 18 years of age or older. Nothing in this provision shall be construed as preventing any court from considering any convictions or diversions occurring during the person's lifetime in determining the sentence to be imposed within the limits provided for a first second, third, fourth or subsequent offense;
- (2) Any convictions for a violation of the following sections which occurred during a person's lifetime shall be taken into account, but only convictions occurring when such person was 18 years of age or older:
  - (i) Violations of this section
  - (ii) Driving a commercial motor vehicle under the influence
  - (iii) Operating a vessel under the influence of alcohol or drugs, K.S.A. 32-1131
  - (iv) Involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 21-3442, prior to its repeal, or subsection (a)(3) of K.S.A. 2011 Supp. 21-5405, and amendments thereto; and
  - (v) Aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567, and amendments thereto;
- (3) "Conviction" includes: (A) Entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of a crime described in subsection (G)(2)(i-v); and receiving punishment under the uniform code of military justice or Kansas code of military justice for an act which was committed on a military reservation and which would constitute a crime described in subsection (G)(1) or (h)(2) if committed off a military reservation in this state; it is irrelevant whether an offense occurred before or after conviction for a previous offense; multiple convictions of any crime described in subsection (G)(1) or (G)(2) arising from the same arrest shall only be counted as one conviction; the prior conviction that is an element of the crime of refusing to submit to a test to determine the presence of alcohol or drugs shall not be used for the purpose of determining whether a

conviction is a first, second, third or subsequent conviction in sentencing under this section and shall not be considered in determining the sentence to be imposed within the limits provided for a first, second, third or subsequent offense; and a person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section, or an ordinance which prohibits the acts of this section, only once during the person's lifetime.

(4) No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section to avoid the mandatory penalties established by this section or by the ordinance. For the purpose of this subsection, entering into a diversion agreement pursuant to K.S.A.12-4413 *et seq.* or 22-2906 *et seq.*, and amendments thereto, shall not constitute plea bargaining.

(H) On and after July 1, 2012, the amount of \$250 from each fine imposed pursuant to this section shall be remitted by the clerk of the district court to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall credit the entire amount to the community corrections supervision fund established by K.S.A. 2011 Supp. 75-52,113, and amendments thereto.

**Section 2. Enactment.** Chapter 17, Article 4, Section 17-104.11 of the Code of the City of Lawrence, Kansas, 2011 Edition and amendments thereto is hereby enacted.

**Section 3. Severability.** If any section, clause, sentence, or phrase of this ordinance is found to be unconstitutional or is otherwise held invalid by any court of competent jurisdiction, it shall not affect the validity of any remaining parts of this ordinance.

**Section 4. Effective Date.** This ordinance shall take effect and be in force upon its passage and publication once in the official city paper as provided by law.

**ADOPTED** by the Governing Body this \_\_\_\_\_ day of June, 2012.

PASSED:

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Robert J. Schumm, Mayor

ATTEST:

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Jonathan M. Douglass, City Clerk

APPROVED AS TO LEGAL FORM:

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Toni R. Wheeler  
City Attorney